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K GRESHAM

**SUPERIOR COURT OF THE STATE OF ARIZONA**  
**COUNTY OF YAVAPAI**

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

NO. P1300CR201001325

**REPLY IN SUPPORT OF MOTION  
TO COMPEL PRODUCTION OF  
EX PARTE AND SEALED  
DOCUMENTS**

(Assigned to the Honorable  
Gary E. Donahoe)

Defendant's Response to State's Motion to Compel ("Response") does nothing to excuse his duty to disclose documents and information upon which he intends to rely at the evidentiary hearing. The Court asked Defendant to address three specific questions during the April 9, 2012 telephonic conference:

- How can YCAO's lawyers prepare for the evidentiary hearing without having the documents Defendant will claim were improperly viewed or printed by YCAO?;
- If Defendant claims that the documents at issue can't be shared with YCAO employees, then why can't that issue be solved by entering a protective order that allows YCAO's outside counsel to have those documents?; and
- Why are sealed documents (that were not filed *ex parte*) at issue in this evidentiary hearing when they are legitimately available to both parties?

1 Despite the Court reiterating these questions in its April 9, 2012 minute entry,  
2 Defendant fails to even address the first and third questions in his Response. YCAO's  
3 lawyers are entitled to a complete set of the documents at issue in order to fully prepare  
4 for and present a defense at the evidentiary hearing scheduled for May 30, 2012. And the  
5 evidentiary hearing should only include documents filed *ex parte*. Documents filed under  
6 seal, but not *ex parte*, are excluded from public view, but are legitimately accessible to  
7 YCAO. There is nothing in the prior orders from this Court or the Court of Appeals'  
8 decision or the opinions of Defendant's ethics expert that precludes this Court from  
9 issuing an order (with appropriate limitations) requiring Defendant to immediately  
10 disclose the documents that he claims were improperly viewed and/or printed by YCAO.

11 A. **This Motion Seeks The Production Of Documents And Information At**  
12 **Issue.**

13 This motion simply requests Defendant to disclose the documents upon which he  
14 expects to rely in seeking sanctions at the evidentiary hearing. Defendant's request for  
15 sanctions is based on claims that YCAO improperly viewed and/or printed certain sealed  
16 and *ex parte* documents. Consequently, Arizona law obligates Defendant to disclose the  
17 documents it claims are at issue in this case and upon which he expects to rely at the  
18 evidentiary hearing. *See* Ariz. R. Crim. P. 15.2, ER 3.4(a). Only by fully viewing the  
19 documents at issue can YCAO's lawyers prepare arguments regarding the factors  
20 identified by the Court of Appeals.

21 Contrary to inflammatory statements made in the Response, this motion is not  
22 about whether YCAO viewed or printed the documents as listed in the Clerk's report.  
23 Defendant assumes that YCAO now takes the position that it did not view and/or print the  
24 documents. That is not correct. But Defendant wrongly claims that the viewing/printing  
25 was improper. Defendant has produced no evidence that YCAO intentionally attempted  
26 to improperly view documents. Indeed, the documents appear to have been made  
27 accessible to YCAO and, in some instances, were even "pushed" to YCAO by the Clerk  
28 of Court through the electronic OnBase system. It also appears that nearly all of the

1 viewing and printing claimed by Defendant as “illegal access” was, in actuality, the result  
2 of mass document printing by YCAO clerk staff without any actual review by the Deputy  
3 County Attorneys assigned to Defendant’s case. This explains why nearly all staff and  
4 Deputy County Attorneys consistently state that they have no recollection of seeing any *ex*  
5 *parte* documents.

6       **B. Lawyers For YCAO Have A Right To Full Disclosure Regardless Of**  
7       **Whether YCAO Has Certain Documents Or Portions Of Documents In**  
8       **Its Possession.**

8       Defendant does not seem to dispute that YCAO or, at the very least, its lawyers  
9 have a right to the documents viewed and/or printed for purposes of the evidentiary  
10 hearing. Instead, Defendant argues that YCAO “already has *most* of the documents they  
11 requested.” Response at 3 (emphasis added). “*Most* of the documents” obviously is not  
12 *all* of the documents. Court rules and fundamental notions of due process require that  
13 Defendant disclose any documents or evidence on which he will rely at the evidentiary  
14 hearing. Having “*most*” of those documents and only cover pages of several documents is  
15 insufficient. Defendant should not be allowed to rely on or refer to any document in the  
16 evidentiary hearing that he does not timely produce to YCAO or its lawyers. The only  
17 way to ensure that both parties possess the same information at the evidentiary hearing is  
18 to require that Defendant disclose all documents that he claims were improperly viewed  
19 and/or printed by YCAO employees.

20       Defendant also argues that Orders issued by Judge Lindberg and Judge Mackey  
21 preclude him from producing the documents requested by YCAO. Response at 4-5. This  
22 argument does nothing but provide another reason to grant this motion. To the extent that  
23 the prior Court Orders limit the production of previously sealed *ex parte* documents, those  
24 limits are subject to further orders of this Court. And that is exactly what this motion  
25 seeks – an order from this Court allowing the documents on which Defendant will rely in  
26 the evidentiary hearing to be shared with YCAO or, at the very least, its lawyers. This is  
27 not, as Defendant states, a “two wrongs don’t make a right” situation; it is a case of  
28 fairness and due process requiring that both parties have access to the same information

1 and documents for purposes of the evidentiary hearing. How can YCAO's lawyers  
2 properly address factors such as "the benefit to the State" or "the prejudice to Defendant"  
3 without actually seeing what information is in the document?

4 Defendant and his ethics expert, Karen Clark, cite to ER 3.4(c) as support for  
5 Defendant's refusal to produce the documents. Response at 5; Declaration of Karen Clark  
6 (attached as Exhibit B to Response) ("Clark Decl.") ¶ 6. Although ER 3.4(c) requires  
7 compliance with Court Orders, it does not limit the ability of a Court to modify or alter its  
8 previous Orders.

9 Ironically, Defendant and Ms. Clark fail to note the more applicable subpart of that  
10 ethical rule. ER 3.4(a) precludes lawyers from "obstruct[ing] another party's access to  
11 evidence or ... conceal a document or other material having potential evidentiary value."  
12 To the extent that Defendant is going to rely on or refer to any particular document at the  
13 evidentiary hearing, it has evidentiary value. Consequently, ER 3.4(a) requires its  
14 production.

15 There is also the question of what prejudice Defendant would suffer from  
16 producing the *ex parte* documents at issue. There are two fundamental flaws in  
17 Defendant's argument that he should not be compelled to produce the documents. First,  
18 as Defendant himself notes in his response, "the state *has already seen and/or possesses*  
19 *the materials.*" Response at 6 (emphasis in original). If YCAO has already seen and/or  
20 possesses the documents, then there is no real prejudice in ensuring that both parties have  
21 full sets of all documents at issue by requiring the requested production. Any documents  
22 that YCAO has not already seen and does not have are not at issue in this proceeding.

23 Second, all of the *ex parte* documents at issue appear to concern Rule 15.9 requests  
24 and orders. And, according the Clerk's report, the last *ex parte* document that was  
25 allegedly viewed or printed by YCAO was a "Notice of Filing" dated September 17, 2010.  
26 To the extent that Defendant disclosed (formally or informally) the experts identified in  
27 those requests or to the extent that the information has become moot, then there is no  
28 ongoing prejudice to disclosing those documents now. As to those documents for which

1 Defendant can show an ongoing prejudice upon disclosure, this Court can fashion an  
2 appropriate protective order that appropriately limits the disclosure of those documents.

3 C. **If Necessary, The Court Can Fashion An Appropriate Protective Order**  
4 **Limiting Disclosure Of Previously Filed *Ex parte* Documents.**

5 As the Court suggested during the April 9, 2012 telephonic conference, the Court  
6 can enter a protective order to appropriately limit the disclosure of any documents to  
7 avoid prejudice to Defendant. The arguments in Defendant's Response mischaracterize  
8 and misapply the relevant ethics rules. Contrary to those arguments, nothing in Arizona's  
9 ethics rules frustrates this Court's ability to enter an appropriate protective order to limit  
10 disclosure of the previously filed *ex parte* documents.

11 1. **The Ethical Duty Of Communication Allows For Limitations On**  
12 **Sharing Documents And Information With Clients.**

13 Defendant starts by arguing that YCAO's lawyers would ethically be required to  
14 share any documents obtained in discovery with their client. Nothing could be further  
15 from the truth. Defendant and his ethics expert, Karen Clark, inexplicably cite the general  
16 duty of lawyers to convey information and documents obtained in the course of  
17 representation without any discussion of applicable exceptions to that general rule.  
18 Response at 6 (citing ER 1.4); Clark Decl. ¶ 7 (citing Restatement (Third) of the Law  
19 Governing Lawyers § 46(3); ERs 1.2, 1.4, 8.4(d)). Although both ER 1.4 and  
20 Restatement § 46(3) contain explicit exceptions that allow a protective order in this case,  
21 the analysis of Defendant and his expert fail to even mention them to this Court.

22 Both the Restatement and ER 1.4 recognize that courts may enter protective orders  
23 that preclude lawyers from disclosing information or documents to their client. ER 1.4  
24 cmt. 7 ("Rules or court orders governing litigation may provide that information supplied  
25 to a lawyer may not be disclosed to the client."); Restatement § 46 cmt. c ("A lawyer may  
26 deny a client's request to retrieve, inspect, or copy documents when ... a court's  
27 protective order had forbidden copying of a document obtained during discovery from  
28 another party ....").<sup>1</sup> This is exactly the type of case for which this exception was

<sup>1</sup> And these are not the only exceptions to the general rule. Both ER 1.4 and the

1 incorporated. To the extent that this Court concludes that disclosure of the *ex parte*  
2 documents to certain individuals within YCAO would be harmful to Defendant's  
3 attorney-client relationship, then it can fashion the appropriate protective order to limit  
4 those individuals' access to the documents and information in those documents. By  
5 fashioning such a remedy, YCAO's lawyers can prepare for the evidentiary hearing while  
6 at the same time limiting or eliminating disclosure that could be harmful to Defendant.

7           2.     Information Learned By Employees Is Not Imputed To Other  
8                 Employees.

9           Defendant's ethics expert, Karen Clark, substantially misapplies the Rules of  
10 Professional Conduct to this situation by claiming that any information shared with one  
11 YCAO employee "is imputed to the entire YCAO." Clark Decl. ¶ 7. There is simply no  
12 support for her novel principle and, indeed, it has several fatal shortcomings. First, the  
13 notion of imputation of information in the ethics context pertains solely to analyzing  
14 conflicts of interest. *See* ER 1.10. Although not specifically citing to ER 1.10, Ms. Clark  
15 quotes language regarding imputation in the conflicts context from the recent decision in  
16 *In re Andrew P. Thomas et al.*, PDJ2011-9001 (April 10, 2012). There is nothing in the  
17 Rules of Professional Conduct regarding imputation of information in any context other  
18 than conflicts of interest. There is no issue here regarding whether a lawyer has conflict  
19 of interest resulting from loyalties to multiple clients. ER 1.10 and its concept of  
20 imputation has no relevance here.

21           Second, even if ER 1.10 were applied by loose analogy, would only be applied  
22 when analyzing the relationship of the lawyer and not the client. In the context of this  
23 evidentiary hearing, YCAO is the client and undersigned outside counsel is the lawyer.  
24 YCAO is not the lawyer for purposes of this evidentiary hearing. There is no ethical rule  
25 that imputes information among employees of clients.

26  
27           Restatement contain several other exceptions to the general rule that are not applicable  
28 here. Contrary to Defendant's and Ms. Clark's characterizations, Restatement § 46 and  
ER 1.4 are far from bright-line rules.

1 Third, Ms. Clark incorrectly suggests that such an imputation would apply to non-  
2 lawyer assistants at YCAO pursuant to ERs 5.1-5.3. ERs 5.1-5.3 are wholly inapplicable  
3 both here and in the imputation of conflicts analysis. Those rules describe the  
4 responsibilities of lawyers to supervise other lawyers and non-lawyer assistants and, in  
5 certain situations, make supervising lawyers professionally responsible for their unethical  
6 conduct. There is nothing in the Rules of Professional Conduct that expands ER 1.10's  
7 imputation of conflicts of interest to non-lawyers. Nor is there anything in those Rules  
8 that even suggests that information learned by non-lawyer assistants is imputed to an  
9 entire law firm.

10 For purposes of the evidentiary hearing, outside counsel for YCAO should be  
11 allowed to discuss and, as necessary, show the documents at issue to witnesses for the  
12 evidentiary hearing. Such witnesses would likely include former Deputy County Attorney  
13 John Butner (who is no longer employed by YCAO), staff who accessed, viewed, or  
14 printed the documents according to Clerk records, and representatives of Management  
15 Information Services.

16 **D. Only Ex parte Documents Should Be Relevant To The Evidentiary**  
17 **Hearing.**

18 Despite being directed by the Court to explain how sealed documents that were not  
19 filed *ex parte* can be relevant at the evidentiary hearing, Defendant did not address that  
20 issue in his Response.<sup>2</sup> why sealed documents that were not filed *ex parte* are relevant at  
21 the evidentiary hearing. As this Court already recognized, sealed documents that are not  
22 filed *ex parte* should not be accessible to the public, but are generally accessible to the

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23 <sup>2</sup> The Response mentioned the alleged viewing of sealed documents by two  
24 employees for the Yavapai County Sheriff, but did not address the nature of those  
25 viewings or how those viewings make documents that were not filed *ex parte* relevant to  
26 this hearing. Response at 7. The Sheriff is not a party to this evidentiary hearing and is  
27 not represented by undersigned counsel. However, pursuant to the Clerk's own report, the  
28 document viewed by Detective John McDormett (dated July 12, 2010) "was in the public  
view until retrieved from the division on 12/10/10 ..." According to the Clerk's report,  
Detective McDormett viewed the document during the time it "was in the public view."  
Additionally, the July 21, 2010 Minute Entry issued by Judge Darrow and quoted by  
Defendant refers to a prior Minute Entry that had been inadvertently copied to the  
Sheriff's Office.

1 parties, including YCAO. Consequently, Defendant has no basis for claiming prejudice  
2 from YCAO's viewing of sealed documents that were not filed *ex parte*. Those  
3 documents should not be at issue in the evidentiary hearing.

4 **Conclusion**

5 This is a straight-forward situation of the necessity to disclose documents and  
6 information at issue in an evidentiary hearing. The requirement for such disclosure is a  
7 basic tenet of procedural due process and rules of procedure. Indeed, it is a breach of  
8 ethics obligations to obstruct or conceal documents or materials having evidentiary value.  
9 Defendant has not identified any specific prejudice to his attorney-client relationship that  
10 would result from the disclosure of previously filed *ex parte* documents that YCAO has  
11 already allegedly viewed and/or printed. However, if Defendant is able to articulate such  
12 prejudice, then the Court should fashion an appropriate protective order to limit the  
13 disclosure of such documents.

14 RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of April, 2012.

15 JONES, SKELTON & HOCHULI, P.L.C.

16  
17 By 

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21 ORIGINAL of the foregoing sent via FedEx  
22 for filing this 20<sup>th</sup> day of April, 2012 to:

23 Clerk of the Court  
24 Yavapai County Superior Court  
120 South Cortez Street  
25 Prescott, AZ 86303  
26  
27  
28



1 COPY of the foregoing emailed  
2 this 20<sup>th</sup> day of April, 2012, to:

3 Honorable Gary Donahoe  
4 Visiting Judge  
5 Email: gdonahoe@q.com

6 COPY of the foregoing emailed and  
7 mailed this 19<sup>th</sup> day of April, 2012, to:

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